In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-309

JOHN D. BURTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on twenty-seven counts of mail fraud, in violation of 18 U.S.C. 1341. On September 11, 1970, he was sentenced to concurrent two-year prison terms on each count. On May 28, 1971, the court of appeals affirmed in a *per curiam* opinion (Pet. App. B 6-8). The petition for a writ of certiorari was not filed until August 30, 1971, and is substantially out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no cause for further review.

The evidence shows that in January 1965 postal authorities in Florida had occasion to interview petitioner concerning solicitations he was then making to

advertisers in local classified telephone directories. Petitioner had no connection with the publishers of such directories but presumably intended to publish a classified directory himself. A postal inspector told him that the solicitations could be fraudulent as they were addressed to telephone directory advertisers and their format was such that the addressee might conclude he was being billed for a renewal of the advertisement in his local classified telephone directory. Petitioner thereupon agreed to discontinue his Florida based venture (T. 460, 465–466, 472).[1]

Petitioner subsequently moved to California where he formed the Classified Directory Company. Commencing in December 1965 and continuing until early 1967, he sent a large volume of form mailings to various business entities throughout the United States (T. 240, 249, 267, 613, 640). The forms were sent only to advertisers in local classified telephone directories, and were copies of the advertiser's name, address, telephone number and industrial classification, as shown in the local directory (T. 227–229, 237–238, 280, 442). Typically these forms showed, in bill form, the cost per year for a directory listing and requested that the entire form be returned with a check for the noted cost in order "to ensure correct insertion." The upper part of the front portion of the form recited, in smaller print, that it was "a solicitation form, not a bill, invoice or renewal." The form also explained that a classified directory would be published

[1] "T." refers to the six-volume trial transcript which we are lodging with the Clerk of this Court. The first five volumes are consecutively paginated.

on or before December 30, 1966, "encompassing selected businesses throughout selected cities in the United States" (see, *e.g.*, Pet. App. D. 12).

After receipt of these forms, a number of advertisers in the yellow pages of local classified telephone directories in Maryland interpreted petitioner's solicitation form as a bill for the advertisements they had placed in the local directories (*e.g.*, T. 45, 62–63, 93, 103). Acting on this erroneous belief, they paid petitioner's company the amount noted as the "annual cost" on the form which petitioner had mailed, either $52 or $65 (*e.g.*, T. 93, 138, 169, 275, 511). By doing so, none intended to buy a listing in the directory which petitioner later published and which they regarded as being of no value to them (*e.g.*, T. 53, 97, 174, 279, 284, 291).[2]

1. Petitioner's basic contention is that there was insufficient evidence to support his conviction; he urges that the forms he mailed out were not misleading and that his alleged "victims" were negligent and failed to act as prudent persons.

As for the form letters, petitioner argues that since they stated that they were solicitations, this shows that they were not designed to be fraudulent bills (Pet. 19, 22–23, 32–37). The jury, however, was not bound by the literal language which petitioner employed. Even though no affirmative misrepresentation of fact is made, a fraud may be intended. See *Blachly* v. *United States*, 380 F. 2d 665, 673 (C.A. 5). In the

[2] Petitioner is mistaken in asserting that none made complaint prior to being contacted by postal authorities (Pet. 36–37). The trial evidence is to the contrary (*e.g.*, T. 513–514, 545–547).

present case there was ample evidence of fraud, including petitioner's prior experience with postal authorities which indicated knowledge by him of a likelihood of misunderstanding by recipients. See *United States* v. *Press*, 336 F. 2d 1003, 1011 (C.A. 2), certiorari denied, 379 U.S. 965. Moreover, petitioner's use of the name Classified Directory Company, the copying of the classification heading, name, address and telephone number of the recipients exactly as they appeared in the local classified telephone directories, his use of a format which resembled a bill, and the mailing of the forms to persons who might have cause to believe that they owed a debt to a local telephone directory publisher were all circumstances from which the jury could conclude that the forms were designed to be interpreted by unwary recipients as bills for previously purchased listings (or renewals of listings) in the yellow pages of the local telephone directories. See *United States* v. *Leopold*, 418 F. 2d 247, 248 (C.A. 4).[3]

[3] *United States* v. *Kram*, 247 F. 2d 830 (C.A. 3), upon which petitioner relies, is readily distinguishable. There the defendant included the word "religious" in the title of his company but when he solicited the purchase of a religious article which he had mailed to a recipient he wrote that the article was sent by "an enterprise that is owned and operated for the benefit of Murray Kram." Kram was indicted for *misleading* recipients into thinking his solicitations were from a religious organization. In reversing his conviction, the court of appeals concluded that there was "hardly a scintilla" of evidence to support the charge that material mailed was misleading (247 F. 2d at 832–833). The decision in *Kram*, thus turned on the failure of the government's evidence to sustain its charge in a particular factual context. It does not govern here where the factual context is entirely different.

The related contention that those who responded to petitioner's mailings as bills were negligent and did not exercise due diligence is also without merit. The trial court properly instructed in this case that the issue was whether petitioner's efforts were designed to deceive persons of ordinary prudence and comprehension (T. 774). This was a correct instruction. See *Blachly* v. *United States, supra,* 380 F. 2d 665, 671–674 (C.A. 5); *Irwin* v. *United States,* 338 F. 2d 770, 773 (C.A. 9), certiorari denied, 381 U.S. 911. That there were those taken in who may have felt chagrin and tended to blame their own lack of prudence hardly precluded the jury from finding a fraudulent intent.

2. Finally, petitioner appears to argue that because the postal investigation commenced in California but he was indicted in the District of Maryland the proceedings were unfair (Pet. 12, 20–22). Petitioner, however, was tried in the District of Maryland only for offenses which had occurred in the district. Venue in that district was proper since it was the district to which petitioner's letters moved and from which he received the mailed remittances. 18 U.S.C. 1341; see *Reed Enterprises* v. *Clark,* 278 F. Supp. 372, 376–377 (D. D.C.), affirmed, 390 U.S. 457.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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